



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 56 OF 2012**

**MICHAEL MUTUA MUTUKU t/a**

**SUNRISE SECONDARY SCHOOL.....PLAINTIFF**

**VERSUS**

**PHILIP MAKANGA C/O**

**VICTORY FAITH MINISTRIES.....1<sup>ST</sup> DEFENDANT**

**THOMAS NYAMBUTO OMWENGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 25<sup>th</sup> February, 2019, the Plaintiff is seeking for the following orders:

- a. That this Honourable Court do set aside and/or vary its ex-parte orders of 16<sup>th</sup> November, 2018.*
- b. That the suit herein be reinstated and heard on its merit.*
- c. That costs of this Application be in the cause.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that this suit was last in court on 6<sup>th</sup> December, 2016 when the same came up for hearing; that on that day, the 1<sup>st</sup> Defendant sought for more time to file his documents and witness statements and that the matter was then fixed for hearing on 22<sup>nd</sup> March, 2018.

3. The Plaintiff deponed that on 22<sup>nd</sup> March, 2018, the court was on vacation and that his advocate tried to fix the matter for hearing but his efforts to locate the file was not successful. The Plaintiff deponed that his advocates on record were never served with the Notice to show cause why the suit should not be dismissed on 16<sup>th</sup> November 2018.

4. The Application was not opposed.

5. The record shows that on 22<sup>nd</sup> March, 2018, the matter came up for hearing but the court was not sitting. The Plaintiff's advocate then fixed the matter for hearing on 5<sup>th</sup> July, 2018. The record does not show what transpired on that day. However, on 24<sup>th</sup> August, 2018, this matter was mentioned before the Deputy Registrar who then fixed it for mention on 26<sup>th</sup> September, 2018.

6. When the matter came up for mention on 26<sup>th</sup> September, 2018, neither the Plaintiff's nor the Defendants' advocate were in court record. Indeed, it is not clear if the mention notice was ever served on the Plaintiff's advocate considering that the Deputy Registrar fixed the mention notice of 26<sup>th</sup> September, 2018 on her own motion.

7. When none of the parties appeared before the Deputy Registrar on 26<sup>th</sup> September, 2018, she directed that the matter should be listed for dismissal on 16<sup>th</sup> November, 2018, which is the date that the suit was dismissed for want of prosecution.

8. Considering that the matter was active in court between 22<sup>nd</sup> March, 2018 and 26<sup>th</sup> September, 2018, the dismissal of the suit for want of prosecution on 16<sup>th</sup> November, 2018, before the lapse of one (1) year, was contrary to the provisions of Order 17 Rule (2) (1) of the Civil Procedure Rules which states as follows:

***“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”***

9. The Plaintiff having fixed the suit for hearing on 22<sup>nd</sup> March, 2018, and the suit having not been listed for hearing because the court was not sitting, it was improper for the court to dismiss the suit on its own motion on 16<sup>th</sup> November, 2018 for want of prosecution. The said dismissal was premature and contrary to the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules.

10. For those reasons, the Application dated 25<sup>th</sup> February, 2019 is allowed as prayed. The suit to be fixed for hearing in the registry on priority basis.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**